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**UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA**

TIARE RAMIREZ, an individual;

Plaintiff,

vs.

WYNN LAS VEGAS, LLC; DOES I
 through X; and ROE Corporations XI
 through XX inclusive,

Defendant.

Case No.: 2:19-cv-01174-APG-EJY

**PLAINTIFF'S OBJECTION AND
 RESPONSE TO DEFENDANT'S
 PROPOSED JURY INSTRUCTIONS**

**PLAINTIFF'S OBJECTION AND RESPONSE
 TO DEFENDANT'S PROPOSED JURY INSTRUCTIONS**

Plaintiff Tiare Ramirez ("Plaintiff" or "Ramirez"), by and through her counsel of record, hereby provides her Objection and Response to Defendant's Wynn Las Vegas, LLC's ("Defendant" or "Wynn") Proposed Supplemental Jury Instruction (ECF No. 152) and Defendant's burden of proof regarding FMLA Interference Claims.

First, Defendant has the burden of proof to establish lawful reason to interfere with Plaintiff's FMLA. As stated in *Sanders*, the FMLA "validly shifts to the employer the burden of providing that an employee what have been dismissed regardless of the employees request for, or taking of, FMLA leave. That approach is also consistent with the Supreme Court's admontiatoin fhat the burden of proof should 'conform with a party's superior access to the proof.'" *Sanders v. City of*

Newport, 657 F.3d 772, 780 (Ninth Cir. 2011).

Sanders stated the following:

A. The FMLA

Enacted in 1993, the FMLA “was the culmination of several years of negotiations in Congress to achieve a balance that reflected the needs of both employees and their employers.” *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1119 (9th Cir.2001). The declared purpose of the FMLA is:

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers.

29 U.S.C. § 2601(b).

Although the FMLA created a statutory right to reinstatement after taking FMLA leave, this right is not without limits. The FMLA is clear on this point: “Nothing in this section shall be construed to entitle any restored employee to ... any right, benefit, or position of employment other than any right, benefit or position to which *779 the employee would have been entitled had the employee not taken the leave.” 29 U.S.C. § 2614(a)(3)(B)

We agree with this approach. In interference claims, the employer's intent is irrelevant to a determination of liability. See *Xin Liu*, 347 F.3d at 1135; *Bachelder*, 259 F.3d at 1130; *Edgar*, 443 F.3d at 507 (“The employer's intent is not a relevant part of the entitlement inquiry under § 2615.”); see also *Colburn v. Parker Hannifin/Nichols Portland Div.*, 429 F.3d 325, 332 (1st Cir.2005) (“[E]mployer motive plays no role in a claim for substantive denial of benefits.”); *Smith*, 298 F.3d at 960 (“If an employer interferes with the FMLA-created right to medical leave or to reinstatement following the leave, a deprivation of this right is a violation regardless of the employer's intent.”); see also *Strickland*, 239 F.3d at 1208; *Hodgens*, 144 F.3d at 159.

“An employer must be able to show, when an employee requests restoration, that the employee would not otherwise have been employed if leave had not been taken in order to deny restoration to employment.” 29 C.F.R. § 825.312(d) (emphasis added) (titled “Under what circumstances may a covered employer refuse to provide FMLA leave or reinstatement to eligible employees?”). Section

1 [825.216\(a\)](#) is to the same effect, and provides that
 2 “[a]n employer must be able to show that an
 3 employee would not otherwise have been employed
 at the time reinstatement is requested in order to deny
 restoration to employment.”

4 As further stated in *Bushfield v. Donahoe*, Interference under [§](#)
 5 [2615\(a\)\(1\)](#) has been interpreted broadly to not only include denial of FMLA rights,
 6 but also to encompass instances where an employer has discouraged an
 7 employee from using FMLA leave, retaliated against an employee for having
 8 exercised or attempted to exercise FMLA rights, or otherwise caused the
 9 employee to suffer an adverse employment action as a consequence of taking
 10 FMLA leave. [29 C.F.R. § 825.220\(b\), \(c\); Bachelder v. Am. West Airlines,](#)
 11 [Inc., 259 F.3d 1112, 1125 \(9th Cir.2001\)](#) (to succeed on FMLA interference claim,
 12 a plaintiff must show by a preponderance of the evidence that the taking of FMLA
 13 protected leave constituted a negative factor in the decision to terminate the
 14 plaintiff's employment or to visit other adverse employment actions upon the
 15 plaintiff). The Ninth Circuit takes an expansive view of what constitutes an
 16 adverse employment action, and has interpreted such actions to include lateral
 17 transfers, unfavorable job references, changes in work schedules, or any other
 18 action that would be reasonably likely to deter employees from engaging in
 19 protected activity. [Ray v. Henderson, 217 F.3d 1234, 1243 \(9th Cir.2000\).](#)

20 Next, Plaintiff objects to Wynn’s proposed Supplemental Jury Instruction
 21 No. 1 re “Authentication and Clarification of Medical Certifications Under the
 22 FMLA.”

23 **PROPOSED SUPPLEMENTAL JURY INSTRUCTION No. 15**

24 **BURDEN OF PROOF—PREPONDERANCE OF THE EVIDENCE**

25 When a party has the burden of proof on any claim or any affirmative
 26 defense by a preponderance of the evidence, it means you must be persuaded by
 27 the evidence that the claim or affirmative defense is more probably true than not
 28 true. You should base your decision on all of the evidence, regardless of which

1 party presented it.

2
3 Gordon, J. Standard Jury Instructions. <[https://www.nvd.uscourts.gov/wp-](https://www.nvd.uscourts.gov/wp-content/uploads/2018/01/Standard-Jury-Instructions-for-Civil-Trials-APG.pdf)
4 [content/uploads/2018/01/Standard-Jury-Instructions-for-Civil-Trials-APG.pdf](https://www.nvd.uscourts.gov/wp-content/uploads/2018/01/Standard-Jury-Instructions-for-Civil-Trials-APG.pdf)>
5 (Ninth Cir. 1.6 including “claim or any affirmative defense”)
6
7

8 Wynn’s proposed Instruction relies on CFR § 825.307. However, this
9 Regulation concerns authentication and clarification of an employee’s *initial*
10 medical certification. Here, there is no dispute that the initial medical certification
11 was granted.

12 Rather, when an employee seeks FMLA leave, the first step is to determine
13 if the employee is eligible. See U.S. Department of Labor Field Operations
14 Handbook Chapter 39 (“FOH”) 39d04¹; 29 CFR 825.123. At step two, the
15 employer may request an initial medical certification to confirm the need for
16 FMLA. See FOH 39h00(a)(1). This occurred in the matter at hand. Step three
17 occurs after a medical certification has been granted but if the employer has
18 doubts about the employee’s use of leave, as is the case here. At that point, the
19 employer must provide proper notice to the employee of its suspicion but, per
20 *Bachelder*, still cannot resort to holding an employee’s FMLA usage as a negative
21 factor in a disciplinary decision.

22 Indeed, this matter is more analogous to *Boecken v. Gallo Glass Co.*, 412
23 F. App’x 985 (9th Cir. 2011). There, the Ninth Circuit reversed and remanded a
24 District Court’s summary judgment holding for an employer-defendant who
25 terminated an employee for engaging in non-covered activities during FMLA
26 leave. *Id.* at 987. The employee in *Boecken*, like here, had sought and received

27 ¹ Available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch39.pdf>.
28

1 an FMLA medical certification. *Id.* However, the employer terminated the
2 employee for “misuse” of FMLA. *Id.* The Ninth Circuit reversed the ruling as the
3 employer had not provided proper notice to the employee of misuse pursuant to
4 29 C.F.R. § 825.301(b)(1). *Id.*

5 Further, to assist this Court, Plaintiff hereby provides citation to the U.S.
6 Department of Labor’s December 9, 1997 opinion letter. There, the U.S. DOL
7 explained:

8 Can an employer terminate the employment of a two-
9 year employee if the employee does not return after
10 fourteen weeks of leave?

11 The FMLA requires covered employers to provide
12 eligible employees with up to 12 workweeks of leave
13 in a 12-month period for any one or more of the
14 specified family or medical reasons. If the employee is
15 unable to or does not return to work at the end of 12
16 weeks of FMLA leave (provided the employer
17 designated the leave as FMLA leave and so notified
18 the employee in writing), all entitlements and rights
19 under FMLA cease at that time. The employee is no
20 longer entitled to any further job restoration rights
21 under FMLA and may be terminated.

22 An employer, however, must observe any
23 employment benefit program or plan or CBA that
24 provides greater family or medical leave rights to
25 employees than the rights established by the FMLA.
26 (See § 29 CFR 825.700.) Thus, an employer under
27 your example would have an obligation under its own
28 “leave of absence” policies to extend leave benefits,
health care benefits, and job protection for up to 14
weeks, but not beyond 14 weeks. You also should be
aware that the discrimination prohibition in FMLA
(Section 105) would prevent an employer from
terminating such employees who have used FMLA
leave and do not return after 14 weeks if the employer
does not treat similarly situated employees who have
not used FMLA leave (for example, employees on
leave to care for an ill grandparent or parent-in-law)
the same.

1 Also, Plaintiff utilizing other types of leave from March 24, 2017 to October
2 14, 2017 does not act as a waiver of Plaintiff's FMLA right to reinstatement. See
3 FOH 39a03; 29 CFR 825.220(d); 73 FR 67934; 73 FR 67986 -67988.

4 Further, under the ADA, when multiple types of leaves are at plan (such as
5 here), an employer must provide leave under whichever statute provides the
6 employee with greater rights and protection. See 29 CFR 825.702(a) -(b).

7 Finally, when an employee's employment is governed by a CBA, the CBA's
8 provisions only apply to the extent they do not conflict with the FMLA. See FOH
9 39j00(d).

10 DATED this 23rd day of October 2024.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5, I hereby certify that the following parties by electronic means on this 23rd day of October 2024 have been served with this **PLAINTIFF'S OBJECTION AND RESPONSE TO DEFENDANT'S PROPOSED JURY INSTRUCTIONS**:

All parties registered through the Court's CM/ECF system.

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